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THE ROANOKE RAPIDS CASE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 28 and 29

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL., RESPONDENTS

VIRGINIA *REA* ASSOCIATION, ET AL., PETITIONERS,

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL., RESPONDENTS

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CAROLINA POWER & LIGHT COMPANY, INTERVENOR RESPONDENT

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THE STATE COMMERCIAL PRINTING CO.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (V-28) is reported at 191 F2d 796, The opinion and order of the Federal Power Commission (I-41) is reported in 87 PUR (NS) 469.

JURISDICTION

The decree of the Court of Appeals for the Fourth Circuit affirming the action of the Federal Power Commission in granting the challenged license was rendered on Octo-

ber 1, 1951, and the petition for rehearing was denied on November 5, 1951 (V-46, 64). Petitions for writ of certiorari were granted on May 5, 1952. The jurisdiction of this Court rests upon Section 313(b) of the Federal Power Act (49 Stat 860, 16 USC § 825).

QUESTIONS PRESENTED

Respondent Virginia Electric and Power Company applied to the Federal Power Commission for a license to construct, operate and maintain a hydro-electric project at Roanoke Rapids on the Roanoke River, a navigable water of the United States. The Secretary of the Interior and the Virginia REA Association, petitioners here, intervened and urged that the Commission had no jurisdiction to entertain the application because Congress had earmarked all projects in the Roanoke River basin for Federal construction and because the Commission itself, by a letter to the Chief of Engineers approving the general plan of development recommended by that official, had deprived itself of jurisdiction to license private power projects in the Roanoke basin. The Power Commission granted the application for a license, overruling the positions urged by Petitioners, and the Court below affirmed. The questions presented are:

1. Has Congress, by the enactment of the Flood Control Act of 1944, withdrawn the proposed Roanoke Rapids development from the licensing power of the Federal Power Commission?

2. Is the Commission precluded from granting a license to the Virginia Electric and Power Company by reason

of the Commission's approval of the comprehensive plan for the development of the Roanoke River basin?

3. Is either petitioner an "aggrieved party" within the meaning of Section 313(b) of the Federal Power Act (Pet App 41-2)?

STATUTES INVOLVED

The principal statutes involved are Section 10 of the Flood Control Act of 1944, 58 Stat 887, and Section 4(e), Section 7(b), and Section 313(b) of the Federal Power Act, Title 16 USC § 797(e), 800(b), and 825l(b). The relevant provisions of these statutes are set out in the appendix to petitioners' brief.

STATEMENT

The petitioners, the Secretary of the Interior and the Virginia REA Association, question the validity of the action of the Federal Power Commission in granting a license to the Virginia Electric and Power Company for the construction of a hydro-electric project at Roanoke Rapids on the Roanoke River. No question of abuse of discretion on the part of the Commission or of the economic feasibility of the project is now in the case. Rather the petitioners rely on the position that the Commission had no jurisdiction to entertain the application for a license because the Congress had withdrawn the Roanoke Rapids site from the licensing power of the Commission and because the Commission had divested itself of that power by its approval of a comprehensive plan for the Roanoke River basin.

ARGUMENT

Despite the fact that the petitions for certiorari raise only three questions, all legal in nature, the petitioners' brief constantly confuses and beclouds these legal issues with arguments concerning the alleged infeasibility of the Roanoke Rapids project, the "surrender" of "huge potential power assets" of the United States, the loss of "net power benefits", etc. These matters were disposed of in the Commission's Findings of Fact, and were affirmed in Section 4 of the opinion below. (V, 42). Since the petitions for certio ri omit any mention of these factual phases of the case in "Questions Presented"[1], we make no attempt in this brief to answer these arguments.

I.

CONGRESS HAS NOT WITHDRAWN THE ROANOKE RAPIDS SITE FROM THE LICENSING AUTHORITY OF THE FEDERAL POWER COMMISSION

A brief statement of the petitioners' argument on this point is that the Flood Control Act of 1944 has reserved for Federal construction all of the potential dam sites on the Roanoke River (11 in number) and those on all of the other major streams n ntioned in the Flood Control Act of 1944, and that Congress has thus withdrawn all of these projects

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[1] "Only the questions specifically brought forward by the petition for writ of certiorari will be considered". U.S. Supreme Court Rule 38, par. 2. See Natl. Licorice Co. v. NLRB, 309 US 350, 357.

The Court will not ordinarily review questions of fact. Genl. Talking Pictures Corp. v. Western Elect., 304 US 175; NLRB v. Waterman S. S. Corp., 309 US 206. The findings of the Federal Power Commission as to the facts, if supported by substantial evidence, are conclusive. Section 313(b) of the Power Act. (Pet App 42).

from the licensing authority of the Power Commission. If this proposition is valid, it would deprive the Commission of licensing jurisdiction not only over all projects on the thirty-five streams and river basins mentioned in the Act of 1944, but also over all projects mentioned in previous and subsequent Flood Control Acts covering most of the major streams in the country. This respondent will attempt to give the Court some of the background of the water power and flood control legislation to demonstrate the unsoundness of this position.

A. THE PLAN AND PURPOSE OF THE FEDERAL WATER POWER ACT OF 1920 IS TO INCOURAGE THE DEVELOPMENT OF THE WATER RESOURCES OF THE NATION BY PRIVATE CAPITAL

In the period between the enactment of the Rivers and Harbors Act of 1890 (26 Stat 426, 454) and the passage of the Federal Water Power Act of 1920 (41 Stat 1063, 16 USC § 791, et seq.) there was a nationwide discussion of how the water resources of our river basins could be best used and developed.[2]

The problem of adjusting all of the interests in a river basin is not an easy one and the several purposes for which a river system may be used are not entirely consistent.

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[2] President Theodore Roosevelt's veto message on the Muscle Shoals Bill (House Document 427, 57th Congress, 2nd Session), on the Rainy River Bill (42 Cong Rec 4698), and on the James River Bill (43 Cong Rec 978); President Taft's veto on the Coosa River Bill (48 Cong Rec 11796); Pinchot's "The Long Struggle for Effective Federal Water Power Legislation", 14 George Washington Law Review 9; Scott, "Water-Power Development and the New River Case", Public Utilities Fortnightly, Jan. 30, 1941; First Iowa Coop. v. FPC, 328 US 152, 180, Notes 23, 24.

Maximum power development requires a high dam, large storage capacity and the release of waters during the hours of the week in which there is the greatest demand for electrical energy. Flood prevention requires empty reservoirs to catch the waters occasioned by concentrated rainfall. Navigation requires low dams, locks and a steady stream flow. Irrigation drains off waters from reservoirs which could otherwise be used for the generation of electrical energy. Problems of stream pollution, fish protection and recreational interests must all be considered.

Generally speaking, the generation of electrical energy is the only use of a river which will pay dividends to private developers. The construction cost of power dams is so large that private capital cannot finance such construction unless there is a certainty of tenure.

Other problems of river control arise from the nature of our Federal system. Most of the great rivers cross state boundaries, and structures erected in the stream in one state affect the uses of the stream in other states. The solution of these conflicts required the exercise by Congress of its powers under the Commerce Clause. At the same time the sovereignty of the states under the Federal system pointed to the regulation of rates and services of electric utilities by states in so far as that was possible.

The debates over these problems resulted in the Federal Water Power Act of 1920, which created a forum where all of these private and public interests and these various river uses could be considered impartially and expertly, and where a decision could be rendered in line with the best comprehensive plan for the development of the particular water resource under consideration. The purpose

of the Federal Water Power Act of 1920 is nowhere better expressed than in this language of Senator Jones (of Washington) in submitting the report from the Committee on Commerce to accompany HR 8184, which became the Water Power Act (Senate Report 180, Calendar 155, 66th Congress, 1st Session):

> It is unnecessary to point out the need for or the beneficent results to come from water power development. *It means a saving of coal,* and a lower price for that used; a saving of oil, and a lower price for that consumed; more efficient transportation and lower cost of service; the development of new industries; the building up of new communities; the creation of new property values, subject to taxation for the support and maintenance of local and State governments; and added employment for labor and increased markets for agricultural products. *Every year that our water powers are undeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development.* Legislative action should be delayed no longer. We should do one of two things: *We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power,* or the Government itself should proceed to make this development. *This bill proceeds on the theory of private development with ultimate public ownership possible.* The House report is made a part of this report, and, following it, the bill as recommended by the committee.[3]

This purpose of encouraging private development was not changed by the 1935 Amendments to Part 1 of the

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[3] NOTE: Emphasis is supplied here and throughout this brief.

Power Act. In fact, the changes in Section 23 (16 USC § 817) encouraged development by private parties in that it required a decision on the necessity of a Federal Power Commission license. The provisions of the Act carry out the purpose of safeguarding the public interest by providing for state and Federal regulation of rates and services (16 USC §§ 812, 813), an investment rate basis, preference in the issuance of licenses to public bodies (16 USC §§ 797, 800), and by preserving the right of the United States to take over at the end of the license period (16 USC § 807). At the same time the statute encourages private development by giving to a licensee the right to occupy the river for a long period, usually fifty years, during which it may amortize its investment and, in the event of recapture by the Government at the end of the license period, recover its then net investment (16 USC §§ 797, 799, 803). These purposes of the Federal Power Act are recognized by the Court in First Iowa Coop. v. FPC, 328 US 152, 180-181; Grand River Dam Authority v. Grand Hydro, 335 US 359, 371; and are expressed in the First Annual Report of the Commission (1921 Annual Report, page 5).

B. THE REPORTS TO CONGRESS MADE BY THE SECRETARY OF WAR AND THE FEDERAL POWER COMMISSION SHOW NO PURPOSE TO EXCLUDE NON-FEDERAL DEVELOPMENT OF THESE WATER RESOURCES

Under the Act of March 3, 1925, 43 Stat 1190 (Pet App 6) the Secretary of War and the Federal Power Commission were jointly directed to submit to Congress an estimate of the cost of making examinations, surveys and investigations of our river basins with a view to making

general plans for the improvement of these streams for the purposes of navigation, electric power generation, flood control and irrigation. This report to Congress was made April 12, 1926 by Dwight W. Davis in his dual capacity as Secretary of War and as Chairman of the Federal Power Commission, as House Document 308, 69th Congress 1st. Session. Paragraph 6 of this document provided in part:

> * * * There are evidently two principal purposes for which investigations of this nature would be useful: Either for the preparation of plans for improvement to be *undertaken by the Federal Government alone or in connection with private enterprise,* or to secure adequate data to insure that waterway development *by private enterprise would fit into* a general plan for the full utilization of the water resources of a stream. * * *

It will thus be seen that this report did not contemplate exclusive Federal development of the river basins but contemplated three possibilities: (1) That the Federal Government would undertake a project alone; (2) that the Federal Government and private enterprise would jointly undertake a project; and (3) that private enterprise alone would undertake the project. In the later event, the reports were designed to insure that any private development licensed by the Power Commission was consistent with the best comprehensive plan for the development of the river basin.

As a result of this report and subsequent appropriations, the Corps of Engineers, representing the Secretary of War and the Federal Power Commission, prepared and submitted to Congress "308" reports which gave comprehen-

.sive histories of practically every river basin, the pertinent data about rainfall, stream flow, potential navigation, flood results, power possibilities, cost estimates, and other matters within the broad scope of the 1925 statute. The "308" report on the Roanoke River was submitted as House Document 65, 74th Congress, 1st Session.

The Flood Control Acts of 1936, 49 Stat 1570, and of 1938, 52 Stat 1215, authorize review of the "308" reports only when congressional committees desire. The Committee on Flood Control of the House of Representatives, by resolution of August 28, 1940, and the Committee on Rivers and Harbors of the House, by resolution of January 26, 1942, requested a review of the "308" report on the Roanoke River. Pursuant thereto the Secretary of War filed with the Congress on June 6, 1944, as House Document 650, 78th Congress, 2nd Session, the review study. This report recommended as a comprehensive plan for the ultimate development of the water resources of the Roanoke River the construction of eleven dams as enumerated in the report, that two of these (Buggs Island and Philpott) should be built for flood control and power generation purposes and that the other nine (including Roanoke Rapids and Gaston) would be power dams with no flood control value (I, 164). Since Buggs Island and Philpott provided almost all of the flood control for the valley, their construction was suggested as the initial step (Ex. 2; I, 136).

The Federal Power Commission's letter of May 3, 1944, attached to the report, concurred generally with the Corps of Engineers, suggested some modifications in the plans for the proposed dams and some investigation of additional

sites, and stated that the building of the Buggs Island and Philpott projects would constitute a desirable initial step (I, 138).

It is significant that Section 1 of the Flood Control Act of 1936, 49 Stat 1570 (Pet App 7), which authorized this review report, determines that the Federal Government should "improve or *participate in the improvement of navigable waters* or their tributaries, including water sheds thereof, *for flood control purposes.*" Even in this Act, which deals only with flood control and not with power, it is again clear that the Federal Government did not undertake to exclude non-Federal agencies from river basin development.

Certainly the Federal legislation and the reports to Congress until the time of the Flood Control Act of 1944 clearly indicate that the Federal Power Commission's authority to license for private development of river basins under regulations protecting the public interest had not been impaired. This brings us to a consideration of the 1944 Act.

THE FLOOD CONTROL ACT OF 1944

V. Authority of the Secretary of the Interior under Section 5

The 1944 Flood Control Act was the first congressional action in which the Secretary of the Interior was given any function with reference to the development of river basins pertinent to the inquiry here.[4] In Section 5 of that Act it is provided:

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[4] Functions of the Secretary of the Interior with regard to irrigation problems and his reclamation duties are unrelated to the issues in this case.

> Sec. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War *not required in the operation of such projects* shall be delivered to the Secretary of the Interior, *who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles,* the rate schedules to become effective upon confirmation and approval by the Federal Power Commission.

It is thus seen that the Secretary of the Interior's duty is solely that of disposing of surplus electrical energy generated at reservoir projects under the control of the War Department. Even here, his rate schedules must be approved by the Power Commission. The Secretary is given no responsibility with reference to the selection of the projects, with reference to river surveys, or with reference to construction matters. It is important that this limited nature of the Secretary's powers be kept in mind as we discuss his position in this case.

2. Analysis of Section 10 and discussion of Petitioners' contention

Section 10 of the 1944 Flood Control Act (Pet App 22, 23), contains a general statement adopting and authorizing certain works of improvement, and this specific provision with reference to the Roanoke River basin:

> *The general plan* for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, *is approved and the*

construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

This language with reference to the Roanoke River basin shows that Congress *approved a general plan* for the comprehensive development of the Roanoke River basin as outlined in House Document 650, and then *authorized* the construction of the Buggs Island and Philpott Reservoirs. It is to be noted that the Roanoke Rapids project is not even mentioned in the Act of Congress. If the Petitioner's contention that the word "approved" as used in this section means the same thing as "authorized", Congress did an unnecessary thing when it *authorized* the construction of Buggs Island and Philpott because these are two of the eleven Roanoke River projects mentioned in House Document 650. Under familiar rules of statutory construction we must assume that Congress has used no superfluous words but that each of the words has a meaning. Platt v. Union Pacific, 99 US 48, 58; McDonald v. Thompson, 305 US 263, 266. It is to be noted that in other portions of Section 10 of the Flood Control Act of 1944 when Congress authorized the construction of any project, it either named the project, even if the estimated cost was as little as $25,000 (Saluda, Iowa-Upper Mississippi River Basin) or $6600.00 (Hazen, North Dakota-Missouri River Basin), or expressly authorized additional appropriations for an entire "comprehensive plan" (White River Basin) 58 Stat 887, Pet App 24.

Petitioners argue that the language in the opening paragraph of Section 10 "that the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes *are hereby adopted and authorized*" carries over into the Roanoke River Basin sub-section so as to "authorize" all eleven projects embraced in the general plan of comprehensive development. There are at least two answers to this position. One is that given by the Court below (V, 34) when it said:

> It could not reasonably have been intended, we think, that all of the projects embraced in these comprehensive plans were authorized for government construction without further action by Congress and were withdrawn from private development under license from the Commission; and the fact that the Act expressly authorized certain of the projects is clear indication that others embraced within the plan were not authorized. *Expressio unius est exclusio alterius.* So far as projects in the Roanoke River Basin are concerned, their coverage by a specific paragraph withdraws them from the general provision under the well-settled rule that general language of a statute will not be held to apply to a matter specifically dealt with. Ginsberg & Son v. Popkin, 285 US 204, 208; MacEvoy Co. v. United States, 322 US 102, 107.
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> 191 F2d 796, 802

A second answer is that it is more logical to say that the "works of improvement" mentioned in the introductory paragraph refer to the specific projects authorized for construction in the many sub-paragraphs following. This is especially so since these works of improvement are referred to as part of the "post-war *construction* program".

The Buggs Island and Philpott projects are the only ones authorized for *construction* in the Roanoke River subsection. In view of the fact that the Roanoke Rapids site is not mentioned in the Act, that this project has only power value, and that Congress stated the *purposes* of these works of improvement to be *navigation, flood control* "and other purposes" (which under the rule of *eiusdem generis* would not include straight power projects), it is difficult to follow petitioner's argument that Section 10 authorized the Roanoke Rapids project. Our construction of Section 10, that only Buggs Island and Philpott were authorized, avoids any conflict between the general language of the introductory paragraph and the specific language of the sub-paragraph.

3. The Roanoke Rapids development is a straight power project and Congress has never authorized Federal construction for power purposes alone

In the Presiding Examiner's report we find excerpts from the hearings before the House Committee on Public Works, 81st Congress, 1st Session, on HR 5472, which became the Flood Control Act of 1950 (III, 1067-1073). There the Chairman of the House Committee and Colonel Gee, official spokesman for the Corps of Engineers, agree that the approval of a comprehensive plan does not carry with it the authorization to construct the elements of that plan (1067) and that the only two projects authorized for construction on Roanoke River are Buggs Island and Philpott (1071-1072). These excerpts also find Mr. Pickett, of the Committee, and Colonel Gee in agreement that only three of the Roanoke River reservoirs, Buggs Island, Philpott and Smith Mountain "have any part of

their purpose to be flood control"; and Colonel Gee makes it very clear that the building of these three will produce all the flood control that the Army Engineers "believe to be economically justified and that the *remaining eight are straight* power projects." (III, 1069-1070 Pet App 146, 157, 159).

That there are no flood control benefits in the Roanoke Rapids project is demonstrated by reference to paragraphs 6, 112, 151, 182, 183 and Tables 36 and 37 of House Document 650 (Exhibit 1, pages 7, 47, 59, 68, 70, 79; I, 144, 152, 158, 166). Paragraphs 182 and 183 (I, 164) point out that the construction of Buggs Island and Philpott would substantially eliminate the flood hazards in the area.

It is important to note that Congress has *never* authorized the construction of a project which is solely for the generation of hydro-electric energy, such as Roanoke Rapids, and there is not the slightest indication in the Flood Control Act of 1944, in either the general introductory paragraph or in the introductory paragraph of Section 10 itself, that Congress intended to begin such a policy with that Act. It is true, of course, that under its power to regulate commerce, the Government has the right to construct a project which generates electricity for any commerce purpose, that is to say, for the improvement of navigation (Arizona v. California, 283 US 423, (1931)), or for flood control purposes (Oklahoma v. Atkinson, 313 US 508); and it has the right to market power produced by a plant constructed under the powers of Congress (Ashwander v. TVA, 297 US 288). However there is grave constitutional doubt as to whether it has the power

to put the United States into the hydro-electric generation business as such.

It is a fundamental principle of statutory construction that every effort will be made so to construe a statute as to avoid constitutional doubt. United States v. Delaware, 213 US 366, 207-8; United States v. CIO, 335 US 106, 121.

Assuming that Congress does have the authority to authorize Federal construction of a straight power project, under the circumstances existing today it is reasonable to conclude that Roanoke Rapids, having no flood control or navigation value, will never be constructed by Federal expenditures. All of the Federal money available for flood control could easily be used on the Mississippi River system to prevent the costly floods which devastate that valley and that of some of its principal tributaries, such as the Missouri and the Ohio. (Pet App 113, 115, 120, 126). Many of the head water developments on the Mississippi system are of such flood control importance that they require vast capital expenditures which cannot be recaptured from the sale of electrical energy. They are, therefore, non-revenue producing projects of a type which private capital will not build, and which must be built with public funds. So long as Roanoke Rapids remains unbuilt by either private or public interests its "huge potential power assets" are of no benefit to the country. It is unreasonable to conclude that the Congress intended this uneconomical result by prohibiting private construction when it did not expect to authorize Federal development.

4. The legislative history sustains respondent's position

Bearing in mind that Roanoke Rapids has no flood control benefit, let us examine the statements of the floor leaders on the bill which became the Flood Control Act of 1944. The Chairman of the House Committee on Flood Control states the policy of Congress as follows:

> MR. WHITTINGTON. *The Committee on Flood Control has adhered to the policy of reporting bills and reporting projects where the dominant interest is flood control.*
>
> * * *
>
> *In further answer to the gentleman's question, we have repeatedly stated during the debate that no project, reservoir, or dam, or other improvement is embraced in this bill unless it is primarily for flood control.* If power can be developed as an incident, or if reclamation can be provided, they are cared for in the bill.
>
> Under leave to extend, as I stated, *none of the dams authorized in the pending bill provide primarily for the generation and distribution of power. The dominant interest in all of the dams is flood control.*
>
> (90 Congressional Record 4122, 4199, 4202).

Similar statements will be found in the Senate discussion:

> MR. OVERTON. According to the testimony, as appraised by the Committee on Commerce, *there are no projects in the bill proposed to be constructed by the Army Engineers in which the interests of flood control do not predominate*, and in the rivers and harbors bill there are no projects in which the interests

both of flood control and navigation are not the predominating and controlling factor.

(90 Congressional Record 8625)

The members of both Houses of Congress understood clearly that only projects with flood control benefits were included in the 1944 bill. This in itself is an answer to the argument that the congressional approval of a comprehensive program which lists reservoir projects with no flood control value was an authorization to construct these projects.

From these congressional actions and reports there emerged a procedure under which a river basin is first studied, surveyed and reported to Congress, with a general plan recommended; then a revised "308" report is given general congressional approval; then, when Congress sees fit to construct a project which has flood control value, it authorizes, then appropriates, then constructs.

The Secretary of the Interior argues that the Government enters upon the improvement when Congress gives its approval to the general plan proposed by the Corps of Engineers, and that the licensing jurisdiction of the Federal Power Commission over any or all of the projects embraced in the plan ceases as of that moment. If this interpretation is correct, then, by its approval of general plans in the 1944 Flood Control Act and in subsequent flood control Acts, Congress has withdrawn from the licensing jurisdiction of the Commission many of the hydro-electric power sites in the country, and has reserved them for Federal use at some future indeterminate date. It is difficult to believe that Congress would use such an

indirect approach to effect such a drastic limitation on the jurisdiction of the Commission, when it could accomplish the same thing by a simple amendment to the Federal Power Act prohibiting any further power development by private interests on navigable waters of the United States.

The more reasonable construction is that the Commission's power to license continues to exist at least up to the actual authorization for construction, and possibly even until the Government has actually started construction. In Savannah River Electric Co. v. Federal Power Commission, (CA 4th), 164F2d 408, the private power company sought a license to construct at Clark Hill on the Savannah River. Surveys of the river had been made and filed with Congress, the comprehensive plan had been approved, construction of the Clark Hill project by the Corps of Engineers had been authorized, money had been appropriated for this specific project, and construction had actually begun. Under those circumstances the Power Commission refused to grant a license to the private power company and the Court of Appeals affirmed. It expressed some doubt as to whether the Commission still had jurisdiction after Congress had expressly taken over for the United States, but found it unnecessary to decide that point.

D. CONGRESSIONAL POLICY AS INDICATED IN OTHER STATUTES

The petitioners place great emphasis on the provisos in the 1936 and 1938 Flood Control Acts (and in each Flood Control Act since that time) that "the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this

Act until the project for the proposed work shall have been adopted by law." They argue that the word "project" contemplates an entire river basin and that the general language at the beginning of Section 10 of the 1944 Act constitutes an "adoption by law" of all eleven sites of the Roanoke River basin plan, so that the Government thereby "entered upon" the entire comprehensive plan. However, the real purpose of the inclusion of this proviso in each Flood Control Act is to avoid a misinterpretation of the action which Congress has taken in the very Act in which the proviso occurs. The same proviso in the 1944 Act represents an effort on the part of the Congress to prevent anyone (here the Secretary of the Interior) from construing preliminary surveys or approval of general plans as commitments for Government construction. A similar provision is found in each year's Appropriation Act for the flood control section of the Corps of Engineers Division, to the effect that the expenditure of funds for completing the necessary surveys shall not be construed as a commitment of the Government to the construction of any project. 58 Stat 327, Public Law 355, 81st Congress, and Public Law 203, 82nd Congress.

Even after a project is specifically authorized, Congress may rescind the authorization. In the Flood Control Act of 1946, 60 Stat 645, Congress authorized at an estimated cost of $11,000,000.00, the Gathright Reservoir and Falling Springs Re-regulating Dam in the James River Basin. Thereafter, in the Flood Control Act of 1948, 62 Stat 1171, 1176, it directed that the preparation of plans and

the construction not be undertaken until a review of the project could be had to determine the desirability of construction at that time. It would seem that this particular project reverted to the status which it held prior to the 1946 Act and that the Federal Power Commission would have licensing jurisdiction over it in the absence of further congressional action.

Section 10 of the Flood Control Act of 1944 contains a proviso that penstocks and other similar facilities shall be installed "in any dam authorized in this Act for construction by the War Department * * *". How can the Roanoke Rapids dam be authorized for Federal construction by this Act when it is not even mentioned in the Act? Obviously the Roanoke River dams which are authorized for Federal construction and for which these penstock facilities must be installed are those at Buggs Island and Philpott, and no others.

The portions of petitioners argument which are included in the Appendix under the captions "An Interpretative Historical Sketch" of Flood Control and Power Legislation and "The Federal Power Policy" (Pet App 48-83, 90-101) furnish no basis for a construction of the pertinent portions of the 1944 Flood Control Act different from that urged herein.

It is true, of course, that there is a public policy incident to all utility regulatory Acts, such as the Federal Power Act and the various State Acts, to encourage the furnishing of utility services at the lowest rates consistent with

a fair return on the investment.[5] But neither that policy nor the one suggested by petitioners has any relevance on the issues here. If their position is construed to mean that there is a federal power policy for the public development of all hydro sites they have failed to demonstrate by reference to any statute, decision or precedent that the Federal Government has altered its purpose of encouraging private development of these sites as shown in the Federal Water Power Act of 1920, its amendments of 1935, and the decisions of this Court reiterating this purpose as late as 1948. Public policy must be found in the nation's laws and precedents, not in any general considerations of supposed public policy. Muschany v. U.S. 324 US 49, 66 (1945).

Petitioners point to no statute giving the Secretary of the Interior authority to establish a Federal Power Policy. In so far as his marketing instructions to his subordinates are consistent with Section 5 of the Flood Control Act of 1944 they are valid; when they go beyond that statute they are unauthorized. (Pet App 96-97).

In any event Federal Power Policy is not relevant to any issue here. Virginia Electric's Roanoke Rapids project was found by the Commission to be in harmony with the approved comprehensive plan and best adapted to a comprehensive plan as that language is used in Section 10(a)

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[5] This regulatory policy for private utilities is strikingly similar to the directive given the Secretary of the Interior by Section 5 of the 1944 Flood Control Act which provides that he must market the surplus power from War Department dams in such a manner as to encourage its use at the lowest possible rates consistent with sound business principles.

of the Federal Power Act. (I, 68, 147). The Court of Appeals affirmed (V, 42-45). The petitions for *certiorari* do not present this factual issue for consideration by the Court.

No sound reason is urged why different parties should not own hydro electric projects on the same stream provided all are "best adapted" to a comprehensive plan and provided the owners of the downstream plants reimburse the owners of the upstream plants for headwater benefits in accord with Section 10(a) and 10(f) of the Power Act. (Pet App 37-38).

II.

THE LETTER OF MAY 3, 1944 FROM THE FEDERAL POWER COMMISSION TO THE CHIEF OF ENGINEERS DOES NOT CONSTITUTE A FINDING THAT THE ROANOKE RAPIDS PROJECT SHOULD BE BUILT BY THE UNITED STATES

Section 7(b) of the Federal Power Act (16 USC § 800(b)) provides that, when in the judgment of the Federal Power Commission, the development of any water resources should be undertaken by the United States itself, then the Commission shall not approve any application for a license affecting such a development but shall survey the proposed development and make a report to Congress.

Petitioners contend that the letter of the Commission of May 3, 1944 embraced in Exhibit 1, pages 2-4 (I, 138-143) constitutes a judgment that the Roanoke Rapids project (and all of the other proposed Roanoke River projects) should be reserved for development by the United States and therefore the Commission now has no

jurisdiction to entertain the application for license of the Virginia Electric and Power Company. This argument is not sound for many reasons.

In the first place Section 7(b) contemplates a determination of whether the resources should be reserved for Federal construction at the time of the application for a license, which in this case is 1950, not 1944. The language of the section shows that intent:

> (b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, *the Commission shall not approve any application* for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, *and estimates of the cost of the proposed development* as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

Petitioners would take the word "whenever" entirely out of the context so as to permit the Commission to make this finding at any time. However, this word must be read in connection with the remainder of the paragraph which shows that the Congress intended that such a determination would be made at the time of a license application.

In the second place, the letter relied upon by petitioners is not addressed to the Congress but to the Chief of Engineers. Section 7(b) specifically states that the Commission "should submit its findings to Congress" when it feels that the United States should undertake a particular development. It is a serious matter for the Commission

to abdicate its licensing authority over a project, and if it intends to forego that authority it should be held to strict compliance with the legislative mandate in accomplishing that purpose.

More important still, the letter of May 3, 1944 does not make any finding that the Roanoke Rapids project should be reserved for construction by the United States. It concurs generally in the conclusion of the Board of Engineers, as shown by the following language:

> * * *, the Commission concurs in the conclusion of the Board of Engineers for Rivers and Harbors that *the comprehensive development* of the Roanoke River basin, in general accordance with the plans prepared therefor by the District Engineer consisting of eleven dam and reservoir projects with power, *is desirable* and that the Buggs Island and Philpott projects would constitute a desirable initial step in the development of the Roanoke River basin. The Commission believes that the power which could be produced at the Buggs Island and Philpott projects could be absorbed and profitably utilized in the post-war period within a reasonably short time following their construction and that plans, therefore, for these two projects should be prepared with the view to their construction in the early post-war period. (House Document 650, Exhibit 1, page 4; I, 142).

It makes no determination as to who will build the eleven projects which were included in the comprehensive program outlined by the Board of Engineers. The effort of the Secretary to interpret the language of the Commission as finding that Federal construction should be undertaken for the Roanoke Rapids project, by reading into the Com-

mission's letter the recommendations of the various engineers who participated in the preparation of House Document 650, must fail. Section 7(b) should be given a reasonable construction, and we must assume that if the Commission intended to make a 7(b) recommendation it would do so clearly and unequivocally, not by inference from the reports of other departments of the Government. Cf. Savannah River Elect. Co. v. Fed. Power Commission, 164 F2d 408, 411.

Another answer is that Section 7(b) of the Power Act should be construed with Section 4(e) of that Act, 16 USC § 797(e) (Pet App 33, 35). If the letter of May 3, 1944 amounted to a 7(b) finding that Roanoke Rapids should be constructed by the United States, then the two year moratorium provided in Section 4(e) for licenses at a government dam should by analogy be applicable to a 7(b) recommendation.

Consideration of the full scope of petitioners' position on this issue leads to an even more fundamental answer than those given above. House Document 650, Exhibit 1, is a typical report on one of the river systems of the United States. There is a similar report on practically every major waterway in the United States, and with each of these reports there is a letter from the Power Commission to the Chief of Engineers of the same type as that embraced in House Document 650 (Pet App 186 et seq.). In most of these letters the Federal Power Commission concurred in some comprehensive development of the water resources of the river under study. If petitioners' interpretation is correct, the Federal Power Commission by these letters has divested itself of jurisdiction to issue

licenses to private parties, or to states and municipalities, for the construction of practically every major undeveloped hydro project in the country. Certainly, if the licensing sections of the Federal Power Act are to be nullified, then it is the responsibility of Congress to pass the nullification legislation. The Federal Power Commission should not be charged with usurping this function of the Congress by any strained construction of the Commission's concurrence in comprehensive programs for river basin development.

Lastly the interpretation of a statute by the administrative agency charged with its administration has always been accorded great weight by the Courts. Billings v. Truesdell, 321 US 542. In this case the Federal Power Commission does not consider that its 1944 letter amounted to a 7(b) finding or that it withdrew the Roanoke Rapids project from the licensing power of the Commission. And in the matter of *Lyles Ford Tri-County Power Authority*, project 1956 (6 FPC 834), the Commission issued a preliminary permit to a non-Federal agency after writing the same type of letter as that contained in House Document 650. (See: Senate Document 189, 78th Congress, 2nd Session, pages 3-6, Santee River, N. C. and S. C.). Cf. Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 US 498, 513, and Safe Harbor Water Power Corp. v. Federal Power Commission, (CA 3d), 1941, 124 F2d 800, 808, Cert. Den 316 US 663.

In summary on the jurisdictional issues, we invite the Court's attention to these facts: The Federal Power Commission, by its action in issuing this license, does not consider that the Roanoke Rapids site has been reserved by

Congress for Federal construction. The Defense Department, which is the other Federal agency charged with national responsibility with reference to flood control and navigation, does not consider that the site has been preempted, as the testimony of Colonel Gee clearly shows. The Senate and House leaders assured Congress that the Bill which became the Flood Control Act of 1944 authorized only flood control reservoirs for construction.

Thus no Federal agency has been authorized to construct the Roanoke Rapids project, no Federal money has been appropriated for its construction, and no one can say whether Congress will ever authorize or appropriate for its construction. In view of these facts, it is unthinkable that Congress intended to withdraw the Roanoke Rapids site from the licensing jurisdiction of the Federal Power Commission.

III.

PETITIONERS ARE NOT ENTITLED TO COURT REVIEW OF THE COMMISSION ACTION

Two petitions for review are at issue here. In No. 28 the petition is filed in behalf of the United States of America on the relation of Oscar L. Chapman, Secretary of the Interior. In No. 29 the petition is filed in behalf of the Virginia REA Association and eleven of its member cooperatives. The respondent Carolina Power & Light Company submits that the United States is not properly before the Court, and that neither of these petitioners is an aggrieved party within the meaning of Section 313 of the Federal Power Act (16 USC § 8251), which reasons would justify this Court in dismissing the petitions without reaching the merits.

A. THE UNITED STATES IS NOT AN AGGRIEVED PARTY

Although the petition for review in No. 28 is filed in behalf of the United States of America, it did not intervene in the proceeding before the Federal Power Commission. While the Secretary of the Interior was permitted to participate in the hearings and, in the final order of the Commission, was given the status of an intervenor in the proceeding, paragraph (A) of the Commission's order (I, 71) provided specifically "That the admission of such intervenor shall not be construed as recognition that he might be aggrieved because of any order or orders entered in this proceeding."

It is within the power of Congress to provide that only parties to an administrative proceeding shall have standing to obtain court review. American Power & Light Co. v. Securities & Exchange Comm., 325 US 385, 390. It has so provided in the Federal Power Act. By Section 313(b), 16 USC § 825l(b), the right to obtain judicial review is limited to "any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding." The United States of America, not being a party to the proceeding before the Commission, filed no petition for a rehearing, which by the terms of Section 313(a) of the Act, 16 USC § 825l(a), is also a prerequisite to judicial review.

Furthermore, it is highly doubtful that the United States, as such, can under any circumstances be an aggrieved party entitled to judicial review within the meaning of Section 313. Section 10(a) of the Administrative Procedure Act, 5 USC § 1009(a), provides:

> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The "relevant statute" here is Section 313 of the Power Act, and sub-section (a) thereof spells out the procedure necessary to petition for rehearing before seeking Court review. This procedure is available to "any person, State, municipality, or State Commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State Commission is a party."

The United States is not included in any one of the four categories entitled to petition for rehearing. It obviously is none of the three last named groups, and the word "person" is defined in Section 3(4) of the Power Act, 16 USC § 796(4) to mean "an individual or a corporation", neither of which would include the United States. See U. S. v. Cooper Corporation, 312 US 600. Even the broader definition of the word in the Administrative Procedure Act, 5 USC § 1001(b), would not include the Sovereign: "'Person' includes individuals, or public or private organizations of any character other than agencies."

The Secretary, in his brief, points to that portion of Section 309 of the Federal Power Act which permits the Commission, "for the purposes of its rules and regulations", to "classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters"; and to the definition of "person" in the Commission's rules, which definition includes "any agency, authority or instrumentality of the United States", etc. It

is obvious that this definition in the Commission rules is for the Commission's own administrative purposes and can have no possible bearing on the question of who is an aggrieved person within the meaning of an Act of Congress. The Commission can not enlarge the statutory definition.

The reason Congress did not authorize the United States to seek judicial review under the Federal Power Act is that Congress has committed the interests of the United States under that Act to the Federal Power Commission, and in Section 7(b) has given the Commission the specific responsibility of protecting the interests of the Sovereign in its water resources (See Comm. Findings 57; I, 68). The necessity of court review of Federal Power Commission action on behalf of the United States simply does not exist.

B. THE UNITED STATES IS NOT PROPERLY BEFORE THE COURT

Neither the petition for certiorari nor the brief filed in behalf of the United States is signed by the Attorney General of the United States or by any officer of the Department of Justice.

The statutes establishing the Department of Justice and the office of Attorney General give to the Attorney General in broad terms the power to control all governmental litigation. 5 USC § 291, 309, 310; United States v. San Jacinto Tin Company, 125 US 273; Sutherland v. International Insurance Co., (CA2d), 43 F2d 969, cert. den. 282 US 890. He is invested with the general superintendence of all suits in which the United States is the plaintiff, and all of the District Attorneys who bring those actions are

under his immediate direction and control. This is necessarily an exclusive power, as is pointed out by Judge Learned Hand in Sutherland v. International Insurance Co., supra.

The necessity of preserving in the Attorney General's office the exclusive control of litigation in which the United States is a party is particularly important where two agencies of the Federal Government are on opposite sides.[6] In the few cases where Departments of the United States have appeared on both sides of litigation, the decision to appear has been one exclusively for the Attorney General, and he, or the Solicitor general, has in each instance actually participated in this Court on one side or the other. United States v. ICC, 337 US 426; Henderson v. U. S., 449 US 316.

At the end of the brief there appears the following statement by the Acting Solicitor General: "The Secretary of the Interior and the Federal Power Commission are adverse parties in this proceeding, and I am authorizing each to be represented in the Supreme Court by agency counsel." This statement indicates that the sovereign rights of the United States are not involved here. Had such rights been involved it is reasonable to assume that the Attorney-General, the Solicitor General or some representative of the Department of Justice would have appeared. The statement merely authorizes the Secretary of the Interior and the Federal Power Commission to be

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[6] The Secretary's repeated argument that he is not an adversary party to the Commission in this matter (Br. 30, 35) would seem to be foreclosed by the statement of the Acting Solicitor General that he is (Br. 246).

represented here by agency counsel. It does not authorize any one to appear for the United States.

C. THE SECRETARY OF THE INTERIOR IS NOT AN AGGRIEVED PARTY

The petition for review in the Court below and petition for certiorari in No. 28 in this Court are not filed in behalf of the Secretary of the Interior. He is merely the relator therein. However, if we assume that the Secretary is the petitioner in No. 28, he is not an "aggrieved" party within the meaning of Section 313 of the Federal Power Act, 16 USC § 825l. His petition to intervene before the Commission (VI, 12), his reply to the opposition to that petition (VI, 32), his petition for rehearing before the Commission (R. 6056) and in the Court below (V, 47), and his petition and brief in this Court suggest no real interest of the Secretary other than the direction to him in Section 5 of the Flood Control Act of 1944 (Pet App 19) to market surplus power at War Department dams at rates to be approved by the Federal Power Commission.

If, under the Commerce Clause, the Government has authority to construct a hydro-electric project, if, in the future, Congress authorizes the construction of the Roanoke Rapids project and appropriates therefor, if the Department of the Army builds it and develops surplus energy, then the Secretary may have electric power and energy for disposition. This interest is too remote and conjectural to make the Secretary an aggrieved party. See: Interstate Electric, Inc. v. Federal Power Commission, 164 F2d 485, dismissing petition to review the Commission's order In re Northwestern Electric Co., 67 PUR 1; Alabama Power Co. v. Ickes, 302 US 464; Frothingham

v. Mellon, 262 US 447; Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 150. Moreover, in order to obtain court review, the Secretary of the Interior must have more than an official interest. See Braxton County Court v. West Virginia, 208 US 192; Joint Anti-Fascist Refugee Committee v. McGrath, supra, p. 151. The Secretary of the Interior has and claims no adverse personal interest in this proceeding.[7]

Apparently recognizing that his status as an aggrieved party is a highly doubtful one, the Secretary now argues that this question was not properly before the Court below, and, presumably, that this Court has no right to consider the question (Br. 18-26). His thesis seems to be that the Commission lost its right to raise the issue when it invited his comments on the original application of Virginia Electric and Power Company (VI, 1), and when it granted his petition to intervene (I, 71); and that VEPCO lost its right to litigate the issue when it failed to question, by petition for rehearing, the Commission order permitting the Secretary to intervene.

The short answer to this contention is that a Federal Court may raise this question at any time, on its own motion. In his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 150, Mr. Justice Frankfurter poses the pertinent question: "Is there, in short, a litigant before us who has a claim presented in a form and under conditions 'appropriate for judicial determination'?"

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[7] The Point that the United States is not a "person" within the review provisions of the Federal Power Act is, we think, equally applicable to the Secretary of the Interior. Supra, p. 31.

The Secretary practically ignores, as being of "no particular application", the condition attached to his intervention that it should not be construed as recognition that he might be aggrieved by any order of the Commission. But irrespective of whether or not that condition is attached to an order granting intervention, the question of who is an aggrieved party can never be one for Commission determination, because it does not arise until after the Commission has acted and review of that action is sought by independent suit in the "original jurisdiction" of the Court of Appeals. See Associated Industries v. Ickes, 134 F2d 694, 699. The Commission cannot confer the status of "aggrieved party" on anyone. Since the question was not before the Commission and since the question of "aggrieved parties" was expressly reserved in the intervention orders there was no issue which VEPCO could have raised by a petition for rehearing before the Commission. The law does not require a party to do a useless thing.

The Secretary cites the Chicago Junction Case, 264 US 258, as "controlling" authority on his point that the Commission permit to intervene establishes a sufficient interest to maintain judicial review. But there the pertinent statute was § 212 of the Judicial Code which, said the Court, "declares that any party to a proceeding before the Commission may, as of right, become a party to 'any suit wherein is involved the validity of such order'. The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied." It is interesting to note that two subsequent cases have construed this statute as referring merely to *intervention* in a court suit

and that it did not mean that a person permitted to become a party to the Commission proceeding could maintain an *independent* suit in Court. Sprunt & Sons v. United States, 281 US 249, 255; Pittsburg & W. Va. Ry. v. United States, 281 US 479, 486, 488.

Petitioner also contends that the decision of the Court below that the Secretary was not an aggrieved party is inconsistent with that Court's action in admitting this respondent and Appalachian Electric Power Company as intervenors. There are two answers to this argument. In the first place, this intervention was without opposition (V, 24). And in the second place, the status of an intervenor under the rules of the Fourth Circuit (Rule 27, Par. 3) is not necessarily similar in any respect to that of an aggrieved party under Section 313 of the Federal Power Act. Obviously, as the Secretary points out, Carolina and Appalachian are not aggrieved by the Commission order in this case; but if the Commission had denied VEPCO's application it is doubtful that these intervenors could successfully claim the status of aggrieved parties, even though their interests would be less remote than those claimed by the Secretary of the Interior here. In such a case, of course, VEPCO itself would be an aggrieved party. Federal Power Commission v. Pacific Power & Light Co., 307 US 156.

The decided cases are of no help to petitioners in their efforts to promote themselves to the status of aggrieved parties. It is true that the requirements of "standing to sue" enunciated in cases such as Alabama Power Co. v. Ickes, 302 US 464, and Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 US 118, have been some-

what relaxed in cases involving statutes with review provisions similar to those in the instant case. American Power & Light Co. v. Securities & Exchange Commission, 325 US 385, 390-391; see Associated Industries v. Ickes, (CA2d), 134 F2d 694, 702-705.[8] But in none of the aggrieved party cases has the Court departed as far from the "standing to sue" concept as the petitioners would have the Court do here. American Power & Light Co. v. SEC, supra; Cia Mexicana, et al, v. Federal Power Comm., (CA5th), 167 F2d 804; Nat'l Coal Ass'n v. Federal Power Comm., (CADC), 191 F2d 462; Interstate Electric, Inc. v. Federal Power Comm., (CA9th), 164 F2d 485; U. S. Cane Sugar Refiners Ass'n. v. McNutt, (CA2d), 138 F2d 116.

We submit that the position of the petitioners here is more closely akin to that of the sugar refiners in the case last cited and to the intervenors in the *Interstate Electric case*, supra, than it is to any of those litigants whom the courts held to be entitled to review in the other cases cited.

Congress has power to formulate the conditions under which resort to the Courts may be had. Federal Power Commission v. Pac. Power & Light Co., 307 US 156, 159. These conditions are set out in the Federal Power Act. Under the facts of this case neither the United States nor the Secretary of the Interior nor the Virginia REA Associations comes within the review categories established by the Congress.

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[8] This Court granted certiorari to review the decision in this case, 319 US 739, but after the expiration of the Act in question vacated the order below, on the suggestion of the parties that the cause was moot, 320 US 707.

D. THE VIRGINIA REA ASSOCIATION, ET AL, ARE NOT AGGRIEVED PARTIES

These petitioners were permitted to intervene before the Commission under a proviso similar to that attached to the Secretary of the Interior's intervention, supra P. 30. In their brief they argue that as organized consumers they have a direct interest in the cost of Roanoke Basin power, that they are entitled to a "preference" in the sale of power to be developed at each site in the Roanoke River basin, and that under the decision of the court below all they can do is stand on the sidelines and "witness the power company take away from them and acquire for itself the first right to the low-cost power to be produced at the Roanoke Rapids site" (Br. 2-4).

These alleged rights of petitioners could not become real until and unless Congress had decided on Federal construction of Roanoke Rapids, the construction had been completed, and the Secretary of the Interior had begun to market surplus power therefrom. This "hope" of lower power rates is not a sufficient interest to make these petitioners aggrieved parties within the meaning of Section 313 of the Federal Power Act. In effect it is merely an assertion that, if the license is not granted to Virginia Electric and Power Company, the Government at a later date may develop the site at Roanoke Rapids as a public power project; and that at such time the Virginia electric cooperatives may need power and may be able to obtain it from the Secretary of the Interior on terms and conditions more reasonable than power can be obtained from other sources.

In their petition for rehearing to the Commission (R. 6105) these petitioners complained at the Commission's

failure to find that they would be aggrieved by the issuance of the license herein, but they did not challenge or discuss the pertinent findings contained in the Commission's order, including the following portion of paragraph (49) thereof (I, 65):

> It has not been shown that licensing of the development of the Roanoke Rapids project to the applicant, a private utility company, would have any adverse effect upon the marketing of surplus energy from the Buggs Island project within the terms and meaning of Section 5 of the Flood Control Act of 1944.

The license herein will not affect adversely the interest of these petitioners, as "preferred customers", in the surplus power and energy to be generated at the projects now under construction by the Department of the Army in the Roanoke River Basin. These petitioners could have no other interest in this proceeding, since Section 5 of the Flood Control Act of 1944 does not require or authorize the Secretary of the Interior to concern himself regarding "the potential output of sites not yet authorized for Federal construction on the Roanoke River" (I, 129).

In its order the Commission properly found that these petitioners "have not shown that under the law as we must administer it they would be aggrieved by approval of the pending application" (I, 46). And the Court below correctly held that the interests of these petitioners are more remote than that of the Secretary of the Interior, himself not an aggrieved party. See Interstate Electric, Inc. v. Federal Power Commission, 164 F2d 485.

CONCLUSION

In keeping with its policy of disposing of controversies within the narrowest confines possible, these petitions should be dismissed because the petitioners have no standing before the Court. If the Court is of opinion that petitioners do have a standing, then we respectfully submit that the action of the Court below should be affirmed on the merits.

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October 13, 1952